Supreme Court, U.S.
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In the Supreme Court of the United States

SHERMAN PARK APARTMENTS, ET AL.,

PETITIONERS,

V.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a comprehensive program designed and implemented by HUD to encourage the construction and operation of low-income housing, memorialized in each instance by a series of interlocking documents specifically prescribed by HUD, the Federal Circuit erroneously extinguished the rights of hundreds of private developers by refusing to construe the writings together as part of a single, integrated transaction for purposes of interpreting HUD's contractual obligations.

2. Whether the Federal Circuit misconstrued fundamental principles of law and this Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), when it held that Congress can willfully repudiate a material promise that HUD made to induce these private developers to construct and operate low-income housing -- a promise Congress acknowledged to be a binding contractual obligation -- so long as the specific paper documenting that promise was not executed by HUD as a party or expressly incorporated into writings executed by HUD.

3. Whether the Federal Circuit misconstrued fundamental principles of law and this Court's decision in *Winstar* when it held that HUD's commitment to provide mortgage insurance "under the . . . provisions of [Section 221(d)(3) or Section 236, as applicable] of the National Housing Act, and the Regulations thereunder now in effect" gave the developers no enforceable rights, because the Regulations then in effect, by their terms, could be amended by HUD.

PARTIES TO THE PROCEEDING

The petitioners are Sherman Park Apartments, Independence Park Apartments, Pico Plaza Apartments, and St. Andrews Gardens. The respondent is the United States.

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PETITION FOR WRIT OF CERTIORARI

Sherman Park Apartments, Independence Park Apartments, Pico Plaza Apartments, and St. Andrews Gardens respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-37a) is recorded at 162 F.3d 1123. The order denying a petition for rehearing and suggestion for rehearing *in banc* (*id.* at 159a-160a) is unreported. The three opinions of the Court of Federal Claims (*id.* at 39a-158a) are reported at 33 Fed. Cl. 196, 37 Fed. Cl. 79, and 38 Fed. Cl. 64.

JURISDICTION

The judgment of the Court of Appeals was entered on December 7, 1998. A petition for rehearing and suggestion for rehearing *in banc* was denied on March

11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

> Twenty-some years ago, the Department of Housing and Urban Development began entering into contracts with owners and developers where in exchange for an interest rate subsidy, the property owners agreed to hold hundreds of thousands of units open as low-income housing units.
>
> Under the terms of the contracts, the owners were allowed after 20 years to prepay the mortgages, and at that point to opt out of the HUD programs. When these contracts began to reach their 20-year maturity, somebody got nervous. In fact, it appears they got so nervous that they just could not stand the idea that maybe somebody would actually opt out of the contracts, and that therefore it would be a good idea to enact a moratorium on the right of the owners to prepay their mortgages.
>
> In fact, that is exactly what happened in the Low-Income Housing Preservation Act of 1987. There are many of us in this Chamber and elsewhere who have doubts as to the advisability . . . and the constitutionality of that.
>
> . . .
>
> . . . These poor devils that entered into these contracts 22 or 23 years ago probably had the mistaken notion that the Federal government was going to honor its word.

136 Cong. Rec. 26,382-83 (1990) (statement of Senator Armstrong).

Notwithstanding Senator Armstrong's and many of his colleagues' opposition, Congress enacted legislation repudiating the government's promise to these developers that they could prepay their mortgages and opt out of the low-income housing program after 20 years. Legislators on both sides of the issue recognized that the legislation breached a contractual commitment made by the Department of Housing and Urban Development (HUD) to the developers. Until this litigation, HUD recognized this as well. In the decision below, however, the Federal Circuit agreed with HUD's litigation-born view that it made no such promise. In so concluding, the Federal Circuit eviscerated the rights of hundreds of developers who had joined with the government to build and maintain the nation's low-income housing.

1. This case involves agreements between the United States and private developers who built and operated federally-assisted, low-income housing projects under programs established by Section 221(d)(3) of the National Housing Act (NHA), Pub. L. No. 83-560, 68 Stat. 590, 599 (1954), *as amended by* Pub. L. No. 87-70, 75 Stat. 149 (1961), and Section 236 of the NHA, Pub. L. No. 90-448, § 201(a), 82 Stat. 476, 498-99 (1968). These federal programs were designed to, and did, encourage private parties to construct, own, and manage housing for low- and moderate-income families.[1] *See, e.g.*, H.R. Rep. No. 90-1585, at 2 (1968). They encouraged private development principally by providing mortgage insurance (which enabled the developers to obtain private loans) and affording developers the benefit of below-market interest rates (under Section 221(d)(3)) or direct interest subsidies (under Section 236). App., *infra*, 3a,

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[1] This brief generally will use the term "low-income" to refer to these classifications.

40a-41a. The developers were required to pass these financial benefits along to their tenants in the form of lower rent payments. *Id.* at 3a, 41a.

2. Petitioners are among the hundreds of private developers who accepted the government's invitation to participate in the Section 221(d)(3) and Section 236 programs. Their agreements were memorialized by the parties' execution of a series of detailed, interlocking contracts, all mandated, drafted, and approved by HUD. In each case, HUD issued a Commitment for Insurance of Advances, addressed to the Petitioner and the private lender for the project, which "set[] forth the terms and conditions upon which the mortgage [would] be insured." 24 C.F.R. § 221.509(a) (1970); App., *infra*, 14a. The Commitment was an offer by HUD, "under the provisions of [Section 221(d)(3) or Section 236, as applicable] of the National Housing Act, and the Regulations thereunder [then] in effect," to insure a deed of trust note between the Petitioner and the lender upon their satisfaction of specified conditions. Fed. Cir. J.A. 122, 142. "All certificates, documents, and agreements called for by [the] [C]ommitment [were required to] be on forms approved or prescribed by [HUD]." *Id.* at 124, 144. The Petitioner "agree[d] to accept a loan insured by [HUD] upon the terms set forth in [the] Commitment." *Id.* at 557, 559, 562. Among other things, the Commitment required the Petitioner to execute a regulatory agreement "to permit [HUD's] regulation of the [Petitioner] as to rents, charges, and methods of operation." App., *infra*, 15a (internal quotation marks omitted).

Each Petitioner entered into a regulatory agreement with HUD, as required by the Commitment and "[i]n consideration of the endorsement for

insurance by [HUD] of the [deed of trust] note."[2] *Id.* at 17a (first and third alterations in original). In the regulatory agreement, each Petitioner agreed to make all payments due under the note; to grant HUD a security interest in the income arising from the project; to rent to HUD-approved tenants at HUD-approved rent levels; to accept a six percent cap on its return on original equity; to submit to HUD audits, inspections, and management reviews; and to maintain the project according to HUD standards. Fed. Cir. J.A. 136-59. The Petitioner was bound by these obligations for so long as HUD insured the mortgage; once the mortgage was paid off (or prepaid), HUD's insurance obligation would terminate, and the Petitioner's obligations under its regulatory agreement would expire. App., *infra*, 4a-5a.

3. Although the mortgages had 40-year terms, Petitioners had the unfettered right to prepay after 20 years. This right was set forth expressly in Rider A to the note. The note was prepared on a standardized form drafted and prescribed by HUD. *Id.* at 4a; Fed. Cir. J.A. 132-35, 151-54. Rider A to the Section 221(d)(3) note provides that "a maker which is a limited distribution mortgagor may prepay without [HUD] approval after twenty (20) years from the date of final endorsement of this Deed of Trust Note."[3] Fed. Cir.

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[2] HUD signed the deed of trust notes twice as an endorser. 24 C.F.R. § 207.254 (1970). The first endorsement evidenced HUD's insurance of the mortgage. *Id.* § 207.254(a). The second endorsement, made after completion of construction, confirmed that the conditions for mortgage insurance had been fulfilled, and that all advances of mortgage proceeds had been made. *Id.* § 207.254(b).

[3] The right to prepay after 20 years without HUD approval was restricted to limited distribution mortgagors. Fed. Cir. J.A. 135, 154, 167, 170. Petitioners are limited distribution mortgagors. *Id.* at 94, 136, 155.

J.A. at 135. Rider A to the Section 236 note contained similar language. App., *infra*, 154, 167, 170. The prepayment right set forth in these riders was consistent with contemporaneous HUD regulations governing the Section 221(d)(3) and Section 236 programs. 24 C.F.R. §§ 221.524(a)(ii), 236.30(a)(i) (1970).

4. In reliance on their right to prepay and convert to conventional rentals at the end of the 20-year period, Petitioners developed properties which they believed would increase in value and allow them to attract market rate tenants. App., *infra*, 126a. They paid premiums for sites in middle class areas, constructed quality buildings and maintained the buildings with the same care as their conventional rentals. *Id.* at 126a-127a. The Court of Federal Claims specifically found that, when petitioners entered into their transactions with the government, they intended after 20 years to prepay their mortgages, terminate their participation in the assisted housing programs, and raise their rents to market levels. *Id.*

5. In the mid-1980s, Congress became "concerned that a large number of owners might shortly exercise their prepayment option" and thereby exit the Section 221(d)(3) and Section 236 programs. *Id.* at 5a. Fearing a shortage of affordable housing for low income tenants, Congress enacted the Emergency Low-Income Housing Preservation Act of 1987 (ELIHPA), Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988). ELIHPA established a temporary moratorium on prepayment to provide Congress with "breathing room" to develop a permanent solution. App., *infra*, 43a. Under ELIHPA, a developer was permitted to prepay only if the termination of HUD restrictions would not cause hardship to current tenants or materially affect the

availability of low income housing. ELIHPA §§ 222, 225, 12 U.S.C. § 1715*l* note.

In 1990, Congress replaced ELIHPA's temporary measures with the Low-Income Housing Preservation And Resident Homeownership Act of 1990 (LIHPRHA), Pub. L. No. 101-625, tit. VI, 104 Stat. 4249 (1990), 12 U.S.C. § 4101 *et seq.* LIHPRHA made permanent the moratorium on unrestricted prepayment. App., *infra*, 5a. LIHPRHA also granted HUD the authority to grant "incentives" to encourage developers "to maintain affordability restrictions on their properties and not prepay their mortgage loans." *Id.* Nevertheless, LIHPRHA, like ELIHPA, prevented developers from "prepay[ing] their mortgage loans after twenty years without HUD approval, as had been permitted under the riders to deed of trust notes" and HUD regulations. *Id.* at 5a-6a.

6. As HUD expressly acknowledged at the time, the specific purpose of ELIHPA and LIHPRHA, was to repudiate the government's promise to allow developers to prepay their insured mortgages and exit the low-income housing program after 20 years. In 1986, R. Hunter Cushing, the Deputy Assistant Secretary for HUD's Multifamily Housing Programs, testified before Congress that, with respect to prepayment, "*there was a contractual relationship between the Federal Government and private owners, that was negotiated at that time, . . . an arm's length transaction that cannot be changed.*" *Loss of Subsidized Multi-family Housing Units: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong. 17 (1986) (*Loss of Subsidized Housing Units*) (emphasis added). Senator D'Amato, who introduced ELIHPA, acknowledged that "[o]wners of projects, who have lived up to a 20-year

agreement with the Federal Government, may be forced [by the moratorium on prepayment] to renegotiate their contracts with the Government." 133 Cong. Rec. 22,209 (1987). Congress determined, however, that the immediate threat to low-income housing justified compromising the prepayment rights of the private developers. *See, e.g.*, H.R. Rep. No. 100-122(I), at 37 (1987) ("The Committee wishes to state that in developing these provisions every attempt was made to balance the contract rights of owners with the need to try to preserve the existing stock of housing for low income persons.").

In 1990, when Congress considered LIHPRHA, HUD Secretary Jack Kemp testified that the existing moratorium on prepayment was a trespass on the rights of low-income housing developers and emphasized the government's duty to fulfill the "commitment to the contract that we entered into with people." *HUD Legislative Proposals: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong. 41 (1990). The Members of the House Committee that proposed LIHPRHA similarly understood that the legislation would breach contracts that the federal government had executed with low-income housing developers. *See Preservation and the Loss of Subsidized Housing Stock: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong. 23-24 (1990); *id.* at 6 ("Just because [of] some fine print allowing prepayment, we're not to cave in and abandon that commitment to tenants.") (statement of Rep. Kennedy); *see also* 136 Cong. Rec. 21,244 (1990) ("In many of the contractual agreements with the government, developers were promised the opportunity to prepay these 40-year mortgages after 20 years.") (statement of Rep. Hoagland).

Extension of the moratorium generated extended and heated debate, with many Members of Congress opposing the legislation on grounds that the United States should honor its contractual commitments. Senator Heflin, among others, addressed the point directly:

> Mr. President, I rise today to address an issue which I feel is of the utmost importance: that is the obligation of the U.S. Government to fulfill contractual agreements into which it enters, or, at a minimum, to justly compensate those parties whose contractual rights it abrogates.
>
> In 1961, Congress enacted the 221(d)(3) program to encourage private development of low- and moderate-income housing under which the Government offered project owners federally insured, 40-year loans at the Federal borrowing rate. In exchange, the Government required that project owners pass the interest benefits to the tenants through lower rents. The owners undertook the risk of building and operating the housing in addition to accepting the limitations of the use of their property and distribution of earnings. This was balanced by the unrestricted right to prepay these mortgages and use the property freely after 20 years.
>
> In 1987, in order to address the possibility that owners would prepay and remove their projects from the low-income inventory, Congress placed a 2-year moratorium on the right to prepay at a time when neither States nor the Federal Government were able to dedicate funds to new construction of low-income housing. That moratorium was extended and expires on September 30 of this year.

> Mr. President, the very notion of unilaterally abrogating a contract, which has been adhered to by one party for 20 years, flies in the face of the law. I am opposed to it, except in the most extreme circumstances. And when such circumstances arise, that party whose rights are denied must be fully compensated.

136 Cong. Rec. 26,372 (1990). His sentiments were echoed by several colleagues. *See, e.g., id.* ("Unilateral abrogation of 20-year-old contracts is not the way to build confidence. Nor is unequitable reimbursement the answer.") (statement of Senator Breaux); *id.* ("[T]he providers of housing honored the contract for 20 years. For 20 years, they stood by the conditions of the contract. Now, the Government is coming back -- the Government for heaven's sake; it would be bad enough if it were private parties -- but the Government is coming back saying, 'Well, we changed our mind. We are going to welsh on the deal.'") (statement of Senator Armstrong); *id.* at 26,375 ("I want to see us protect those contractual rights that the owners entered into some 20 years ago.") (statement of Senator Mack).

Even the proponents of an extended moratorium on prepayment acknowledged that it would compromise the government's contracts with the housing developers. Senator Cranston defended the legislation by asserting that Congress's authority to "adjust the burdens and benefits of economic life" included the ability to "specifically alter the instrument of the parties who contracted with the Federal Government." *Id.* at 26,371; *see also id.* at 26,374 ("[M]any believe that the Senate prepayment provision contained in the housing bill may lean so far in the direction of tenant protection that, ultimately, the Federal Government is not honoring its contractual agreement with owners. This is the issue that Senator Armstrong is raising.

And, in all candor, I think we have to agree with him.") (statement of Senator D'Amato); *id.* at 26,385 ("I do not think we have a right to arbitrarily say contracts that were entered into in good faith years ago, which drew people into an arrangement which allowed them to put their private capital on the table and suggested to them sometime as a consequence of that they would be able to make a profit – all of a sudden we would be willing to say sorry, we are changing the rules.") (statement of Senator Kerry).

Ultimately, Congress determined (as it had in 1988) that the threat of losing low-income housing justified the new legislation. Pub. L. No. 101-625, 104 Stat. 4249 (1990); *see also* H.R. Conf. Rep. 101-625, at 458 (1990).

7. Petitioners and 42 other low-income housing development partnerships brought this action under the Tucker Act, 28 U.S.C. § 1491, to recover damages they suffered from their inability to prepay their mortgages and convert their properties to market rentals.[4] App., *infra*, 2a & n.1. They alleged that, by enacting ELIHPA and LIHPRHA, the government breached its contractual promise that they would have the unfettered right to prepay their mortgages after 20 years. In orders dated March 27, 1995 (*id.* at 39a-91a) and December 11, 1996 (*id.* at 92a-103a), the Court of Federal Claims granted Petitioners' motions for summary judgment on their breach of contract claim.

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[4] Sherman Park Apartments and St. Andrews Gardens eventually obtained subsidies under ELIHPA that approximate market-level rents. Independence Park Apartments and Pico Plaza Apartments sought low-income preservation incentives under LIHPRHA, but in lieu of funding these incentives, Congress passed the Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (HOPE Act). The HOPE Act permitted developers to prepay their mortgages so long as they agreed not to raise rents for 60 days. Fed. Cir. J.A. 49.

In granting summary judgment for Petitioners, the Court of Federal Claims rejected the government's argument that, because the prepayment provisions "were contained in the deed of trust notes entered into by [Petitioners] and their lenders, [and] not in the regulatory agreement into which HUD entered with the owners," Petitioners' "putative prepayment rights are not enforceable against the government." *Id.* at 59a. Observing that "essential terms of the regulatory agreement make explicit reference to terms of the deed of trust note," that "the regulatory agreement, by its terms, was to remain in effect as long as the deed of trust note remained outstanding," and that "the rider specifically allocated certain rights between HUD and [Petitioners]," the court held that the government need not be a "named party" to the note for it to be bound by its prepayment promise. *Id.* at 56a-57a.

In determining the extent of the government's prepayment obligations, the Court of Federal Claims adhered to the common law rule that "all writings that are part of the same transaction are interpreted together." *Id.* at 58a (quoting *Restatement (Second) of Contracts* § 202 (1981)). Applying this rule, the court held that the regulatory agreement and the deed of trust note -- which were executed contemporaneously -- "must be read together in order to determine the full intentions of the parties when they initially entered into their relationship." *Id.* By viewing the transaction as a whole, the court found that "when the parties in this case entered into the regulatory agreement, they also intended to be mutually bound by the prepayment rules set forth in the rider to the contemporaneous deed of trust note." *Id.*

Having found the government in privity, the court concluded that the undisputed facts established the government's breach, *id.* at 58a-59a, 99a, and, after a

four-day trial, the court awarded the Petitioners $3,061,107 in damages. *Id.* at 11a, 104a-159a.[5]

8. A divided panel of the Federal Circuit reversed. The panel majority refused to construe the interlocking, contemporaneously-executed documents together to determine the intent of the parties. Instead, the majority stated that "all of the agreements . . . are relevant" only in "determining the meaning of each separate contract." *Id.* at 21a-22a. Thus, although the deed of trust note addresses prepayment, the majority held that "the agreement represented by each deed of trust note was between the relevant [Petitioner] and its private lending institution" only, and that HUD was not a party to either the note or its rider. *Id.* at 20a. Because it found that HUD "was a named party to only . . . the regulatory agreement," which did not "mention prepayment" and "did not incorporate any other agreement, including the deed of trust note or Rider A to the deed of trust note," *id.* at 19a, the majority held that HUD never made any promise concerning prepayment at all. *Id.* at 22a.

In reaching that conclusion, the panel majority gave no weight to the Commitment's incorporation of contemporaneous HUD regulations, which expressly permitted prepayment after 20 years. *Id.* at 22a-24a. To the contrary, the majority held that, because HUD reserved the power to amend its regulations, "it would have been inconsistent for HUD to have entered into the regulatory agreement if the agreement fixed" Petitioners' prepayment rights. *Id.* at 24a.

In the panel majority's view, the courts' holdings in *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed. Cir. 1995) (*in banc*), *aff'd*, 518 U.S. 839 (1996), had no

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[5] Petitioners, four of the 42 plaintiffs in this action, were selected as "model plaintiffs" for purposes of the damages trial. *Id.* at 2a n.1, 11a.

application to this case. App., *infra*, 27a-29a. Although *Winstar* also involved a complex government transaction involving multiple, interlocking documents, the majority held that *Winstar* was distinguishable because the agreements in *Winstar* had an integration clause that incorporated the contemporaneous documents which formed the basis of plaintiffs' claims. *Id.* at 28a.

Judge Archer, author of the Federal Circuit's *in banc* decision in *Winstar*, dissented. He faulted the majority for considering each of the documents involved in the transaction "in virtual isolation" (*id.* at 35a) and failing to examine several "critical factors" to determine the parties' intent. *Id.* at 31a. In contrast to the majority, Judge Archer considered the *quid pro quo* that arose between the government and the private developers to accomplish the goal of constructing and operating low-income housing. *Id.* at 31a. Specifically, Judge Archer observed that the developers agreed to accept certain "disincentives," *i.e.*, restrictions on rent and the income they could earn, in exchange for the promise that they could convert their projects to market properties without HUD approval after 20 years. *Id.* Judge Archer also examined the "nature and mechanics of the transactions," including the fact that HUD "furnished" the prepayment language in the rider to the deed of trust notes. *Id.* at 32a. Based on his evaluation of these factors, Judge Archer thought it "entirely appropriate" for the Court of Federal Claims "to find the parties' intent based on all of the documents and the surrounding facts and circumstances . . . in complex, integrated transactions of this sort, where multiple parties executed multiple documents at closing." *Id.* at 35a.

Judge Archer also looked to the Commitment for Insurance of Advances in determining the parties'

intent. Although the Commitment was largely ignored by the majority, Judge Archer (quoting in part from the Commitment) explained that it constituted HUD's offer "under the . . . provisions [of Section 221(d)(3) or Section 236, as applicable] of the National Housing Act, and 'the Regulations thereunder *now in effect*,'" to provide mortgage insurance upon the satisfaction of certain conditions, including the plaintiffs' execution of the deed of trust note. *Id.* at 37a. Noting that the HUD regulations *then in effect* afforded property owners the right to prepay their mortgages after 20 years, *id.*, Judge Archer concluded that, by endorsing the deed of trust note for insurance, the government bound itself to permit prepayment without HUD approval after 20 years. *Id.*

REASONS FOR GRANTING THE PETITION

Over 20 years ago, the government intentionally induced hundreds of private developers across the nation to invest billions of dollars to construct and operate low-income housing with the promise that, after 20 years, they would have the unfettered right to convert their properties to market rentals. Because the agreements that each of these developers executed with the government are substantially similar, *see, e.g.*, *Lurline Gardens v. United States*, 37 Fed. Cl. 415 (1997); *Greenbrier v. United States*, 40 Fed. Cl. 689 (1998), the Federal Circuit's decision in this case will affect the 600 private developers who have brought 21 separate actions for hundreds of millions of dollars in damages they suffered as a result of the government's breach of its prepayment promise.[6] The Federal Circuit concluded, as a matter of law, that the promise was never made because it improperly considered each of

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[6] *See* Brief of Defendant-Appellant United States, filed with the Federal Circuit on Oct. 20, 1997, at 3 n.3 (summarizing pending actions before the Court of Federal Claims).

the interrelated documents in isolation, and refused to look to the realities of these transactions.

Judge Archer in dissent correctly observed that, particularly "in complex integrated transactions . . . where multiple parties execute[] multiple documents at closing," the intent of the parties must be determined by considering all of "the documents and the surrounding facts and circumstances." App., *infra*, 35a. Judge Archer's approach was followed by Judge Robinson, the trial court judge in this case, and has been adopted by two other judges on the Court of Federal Claims. *See id.* at 56a-59a; *Statesman Sav. Holding Corp. v. United States*, 41 Fed. Cl. 1, 6-8 (1998) (Miller, J.); *California Fed. Bank v. United States*, 39 Fed. Cl. 753, 772-74 (1997) (Smith, J.). The panel majority, however, finding no explicit incorporation clause, rejected Judge Archer's approach, and instead viewed each of the constituent documents in this case as a "separate agreement[]."[7] App., *infra*, 22a. As a result, the Court failed to give effect to the parties' undisputed intentions, and permitted the government to repudiate a promise with which it had induced private developers to invest billions of dollars in low-income public housing.

This case raises fundamental issues of law that affect all who enter into complex transactions with the government. Because the Court of Federal Claims has exclusive jurisdiction under the Tucker Act over significant claims for money damages arising from government contracts, 28 U.S.C. § 1491, the impact of this decision is enormous. For example, in addition to the actions brought by 600 developers with regard to

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[7] The reasoning of the panel majority has been followed in *Lurline Gardens*, 37 Fed. Cl. at 420-21 (Weinstein, J.) and *Greenbrier*, 40 Fed. Cl. at 698-700 (Merow, J.).

these contracts, over 120 cases are pending before the Court of Federal Claims as a result of this Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), which held that savings and loans associations that relied on the government's promise of favorable regulatory treatment could recover damages for breach of contract after the government reneged on its promise. *See California Fed. Bank*, 39 Fed. Cl. at 755. The Federal Circuit's decision in this case casts doubt on the ability of many of these *Winstar*-related plaintiffs to recover, because in many cases the promise of favorable regulatory treatment was not expressly incorporated into a written agreement to which the savings and loan and the government were signatories. *See id.* at 772-73.

The Federal Circuit's approach to these complex, multiparty government agreements is contrary to core, longstanding principles of law and flatly inconsistent with this Court's guidance in *Winstar*. If it is not reversed, this decision will not only result in manifest injustice to hundreds of private developers, but will gravely affect the government's ability in the future to enlist the private sector in partnership for its public programs. The Court should grant this petition for certiorari because of the importance of the questions raised to the administration of government contracts and to the legitimate expectations of thousands of private parties who contract with the government.

1. No one ever disputed in this case that the government provided Petitioners the option of early prepayment in order to entice them to participate in HUD's low-income housing program. The language governing prepayment in Rider A to the deed of trust note was required and "supplied by HUD" (*see* App., *infra*, 56a-57a & n.9) and effectively tracked the rule established in contemporaneous HUD regulations. *See*

24 C.F.R. §§ 221.524(a)(ii); 236.30(a)(i) (1970). HUD has admitted frankly that it provided the developers a 20-year contractual prepayment right "to get [developers] involved in the program, . . . to try and convince them to get in the program."[8] Jona Goldrich, the founder and general partner of each of the Petitioners, provided uncontradicted testimony that he paid premiums for sites in middle class neighborhoods and maintained the buildings with the same care as his conventional rentals in reliance on the government's promise that he could prepay the mortgages and convert the properties to conventional rentals after 20 years. *See* Fed. Cir. J.A. 482-83.

Further, before the commencement of litigation arising out of the enactment of ELIHPA and LIHPRHA, no one disputed that the government's prepayment promise was a *contractual* commitment between the government and the developer. Indeed, even in litigation, HUD initially represented in federal court that it "did enter into contracts" with developers with respect to the prepayment promise.[9] Moreover, as recently as February 1997, HUD argued that the proper way to interpret the interlocking documents involved in this case is to construe the "regulatory agreement . . . in the context of its role in effectuating a program under the National Housing Act and with regard to the documents that together comprise the loan transaction, specifically the mortgage instruments."[10]

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[8] *Loss of Subsidized Multifamily Housing Units* at 18 (1986).

[9] *See* Brief for the Appellees, filed on Jan. 8, 1990 in *Thetford Properties IV Ltd. Partnership v. United States*, No. 89-1778 (4th Cir.), at 24.

[10] United States' Memorandum in Opposition to the Defendants' Motion for Summary Judgment, filed on Feb. 24, 1997 in *United States v. David*, No. 94-7191 (E.D. Pa.), at 4.

Contrary to the majority's reasoning, the various constituent documents in each transaction did not "stand[] alone." App., *infra*, 22a. The panel majority failed to appreciate that the regulatory agreement executed by HUD was to remain in force only while the mortgage loan remained outstanding, and the duration of the mortgage loan could in turn be determined only by considering the prepayment provision in Rider A to the deed of trust note. By prohibiting prepayment of the mortgage loan without HUD approval during the first 20 years, the rider provided HUD the right to enforce the regulatory agreement for at least that long. Correspondingly, by permitting the developer to prepay without HUD approval after 20 years, the rider granted the developer the unfettered right to terminate the regulatory agreement at that time. Despite universal acknowledgment of the importance of Petitioners' prepayment rights in the overall scheme of the transaction, the panel majority, by addressing each component of the transaction separately, concluded those rights were not enforceable against HUD.

By construing the deed of trust note and its rider as an agreement only "between the relevant [Petitioner] and its private lending institution," *id.* at 20a, the panel majority ignored the entire context of the instrument: HUD required the prepayment provision in the rider to the deed of trust note *for its own benefit*, to ensure that it had the right under the regulatory agreement to require Petitioners to remain in the low-income housing program for at least 20 years and to induce Petitioners - with an assurance respecting prepayment – to enter into the regulatory agreements in the first place. The panel's decision effectively treats HUD as a stranger to the note and its rider, even though the language was drafted by HUD, the sole purpose of the rider was to allocate rights and obligations between the plaintiffs and HUD, and HUD's approval of the note

and its rider was a specific condition to HUD's offer as expressed in the Commitment.

2. The Federal Circuit's refusal to consider the entire transaction framed by the interrelated documents is flatly inconsistent with the approach taken by this Court in *Winstar*. Like this case, *Winstar* involved a circumstance in which the federal government required the assistance of private parties to accomplish an important public endeavor; in that case, the rescue of the failing savings and loan industry. 518 U.S. at 844-48. Lacking the funds to resolve the savings and loan crisis directly, the government enticed healthy savings and loans to acquire failing thrifts with the promise of favorable regulatory treatment. *Id.* at 847-48. This favorable treatment included allowing the healthy thrift to count goodwill from the acquisition as capital for purposes of federal solvency regulations, allowing the thrifts to amortize the goodwill over a 40-year period, and allowing the thrift to count cash received from the government both as an intangible and as a tangible asset. *Id.* at 850-53.

When this policy failed to resolve the savings and loan crises, Congress enacted a new statute that drastically altered federal regulation of the savings and loan industry, including eliminating the favorable regulatory treatment that the federal government had promised to allow. *Id.* at 856-58. In the resulting litigation, the government argued, as it argued here, that its promise of favorable regulatory treatment "simply reflect[ed] statements of then-current federal regulatory policy rather than contractual undertakings." *Id.* at 862 (plurality opinion). This Court rejected that argument, finding "unconvincing" the government's suggestion "that the parties meant to say only that the regulatory treatment laid out in these documents would apply as an initial matter, subject to

later change at the Government's election." *Id.* at 909-10 (plurality opinion); *see also id.* at 919 (Scalia, J., concurring in the judgment) ("I agree with the principal opinion that the contracts at issue in this case gave rise to an obligation on the part of the Government to afford respondents favorable accounting treatment.").

Although *Winstar* and this case both involve incentives offered by the government to induce private parties to participate in government transactions memorialized by a series of contemporaneous, interlocking writings, the Federal Circuit refused to apply *Winstar* to this case. App., *infra*, 27a-29a. The panel majority sought to distinguish *Winstar* because of the presence in that case of "integration clauses that expressly incorporated contemporaneous documents that allowed" the thrifts to receive favorable regulatory treatment. *Id.* at 28a. Although the deed of trust note and its rider containing the prepayment provision are "contemporaneous documents," the majority held that they could not bind the government because they were not "expressly incorporated" into a document to which Petitioners and HUD were formal parties. *Id.*

The panel majority fundamentally misread *Winstar*. The Supervisory Assistance Agreements (SAAs) that were at issue in *Winstar* did *not* expressly incorporate the promise of favorable regulatory treatment. Rather, each SAA contained an integration clause which prohibited consideration of other documents except for Bank Board resolutions referencing the regulatory forebearances. The Bank Board resolutions stood in the same position *vis-à-vis* the SAAs as the deed of trust notes in this case stand *vis-à-vis* the regulatory agreement, which contains no integration clause.

Contrary to the panel majority's view, moreover, while an express incorporation provision "often makes clear precisely what documents constitute a contract,"

it is not a precondition to an integrated consideration of contemporaneously-executed documents. *California Fed. Bank*, 39 Fed. Cl. at 773; *see also id.* at 774. ("Mutuality of intent, even in the context of written contracts, may be established by several contractual instruments as opposed to one superseding document .... Contracts are frequently found to exist despite the absence of an integrating document."). Until this decision, even the government rejected the notion that "the presence of an explicit, integrated contract is the *sine qua non* of governmental contractual liability."[11] In fact, while this case was pending before the Federal Circuit, HUD argued in a separate proceeding involving similar documents that "the mortgage..., the note [and] the Regulatory Agreement" must be construed together as the "entire contract between the parties." *United States v. David*, No. 94-7191, 1998 WL 351693, at *4 (E.D. Pa. June 30, 1998). Not surprisingly, the day after the panel's opinion was issued, the government altered its stance 180°: it now contends that the presence *vel non* of an integration clause is "critical" in determining the extent of the government's contractual promises. *See* Defendant's Response to the "Select Committee's Amicus Curiae" Brief Concerning "The Absence Of Any Relationship" of the Standing Argument to the Source of Payment for Judgments in the Winstar-Related Cases, filed on Dec. 8, 1998 in *Plaintiffs in All Winstar-Related Cases at the Court v. United States*, Nos. 90-8C *et al.* (Fed. Cl.), at 5-7 (*Winstar Brief*).

Further, although the SAAs' integration clauses were relevant in *Winstar*, the *Winstar* plurality indicated that, even absent such clauses, reference to

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[11] *See* Defendant's Request for Certification of an Interlocutory Appeal, filed on June 17, 1990 in *Suess v. United States*, No. 90-981C (Fed. Cl.), at 6.

the overall facts and circumstances of the transaction would have led to the same result. *Winstar*, 518 U.S. at 863 ("To the extent that the integration clause leaves any ambiguity, . . . the realities of the transaction favored reading those documents as contractual commitments.") (plurality opinion). In this case, by declining to consider the overall facts and circumstances and the "realities of the transaction," the Federal Circuit failed to give effect to the parties' intent. *See The Binghamton Bridge Co.*, 70 U.S. (3 Wall.) 51, 76 (1865) ("[I]t should never be lost sight of, that the main canon of interpretation of a contract, is to ascertain what the parties themselves meant and understood.").

Had the panel majority adhered to reasoning of *Winstar*, it would have found that the documents here, as in *Winstar*, evidence the parties intent to bind the government contractually; and to the extent the documents leave "any ambiguity," the "realities of the transaction" would have resolved those ambiguities in Petitioners' favor. 518 U.S. at 863 (plurality opinion). The realities are that the undisputed purpose of "the 20-year lock-in period" was "to get [for-profit developers] involved in the program, . . . to try and convince them to get in the program." *Loss of Subsidized Multifamily Housing Units* at 18. And, indeed, the Court of Federal Claims expressly found that Petitioners got "involved in the program" (*id.* at 18) in reliance on the government's prepayment incentive (App., *infra*, 126a-127a), a finding that the Federal Circuit did not reverse.

As noted above, Congress knew full well that the "specific object" of ELIHPA and LIHPRHA was to "abrogat[e]" the government's contractual promise to allow developers to prepay their insured mortgages after 20 years and exit the HUD program. *See Winstar*,

518 U.S. at 900 (plurality opinion); *see also id.* at 924 (Scalia, J., concurring in the judgment) (observing that "Congress specifically set out to abrogate the essential bargain of the contracts at issue"). Congress enacted ELIHPA and LIHPRHA not because it determined that the government had not made a prepayment promise, but because it concluded that the interests of low-income tenants outweighed the government's contractual commitments. *See, e.g.*, H.R. Rep. No. 101-122(I), at 37 (1987); H.R. Conf. Rep. 101-625, at 458 (1990).

The Federal Circuit improperly ignored the relationship among the documents and other abundant evidence of the parties' undisputed intent, however, and instead applied a "narrow and technical" construction that "defeat[ed] the very end" the parties sought to accomplish. *The Binghamton Bridge Co.*, 70 U.S. (3 Wall.) at 78 (refusing to apply the literal language that was incorporated into a contract, where doing so would "defeat the very end the legislature had in view" when it entered into the contract).

In contrast to the Federal Circuit's decision in this case, the Ninth Circuit articulated the correct approach in *Far West Fed. Bank, S.B. v. Office of Thrift Supervision-Director*, 119 F.3d 1358 (9th Cir. 1997). In that case, the Ninth Circuit concluded that investors in a failed thrift who did not sign a contract with the government in their individual capacities could nevertheless pursue a *Winstar*-type suit against the government. Noting that the "sole purpose of the entire transaction [at issue] . . . was for the Investors to invest $26.6 million in Far West in exchange for promises by the [government] to regulate Far West in a manner that would make their investments financially sound," the Ninth Circuit held that "[t]o deny the Investors an opportunity to recover for [the

government's] breach simply because Far West and not the Investors signed one of the documents evidencing those promises would place the form of the agreement over its substance." *Id.* at 1364; *see also Bluebonnet Sav. Bank, F.S.B. v. United States*, 43 Fed. Cl. 69, 74 (1999) (holding that plaintiffs who were not signatories to a contract were nevertheless parties to it). The Federal Circuit's failure to hold the government to the promise it made regarding prepayment similarly placed form over substance, and in doing so, failed to give due regard to the intentions of the parties to these transactions.

3. The Federal Circuit also misapplied fundamental principles that guided this Court's decision in *Winstar* by deeming insignificant the Commitment's incorporation of regulations that were in effect at the time of the transaction, which provided the developers a 20-year prepayment right. By incorporating the regulations *then in effect* into its offer to the developers, HUD did not merely promise to apply its regulations as they might change from time to time, but instead relinquished its right to change the terms of the contract by amending those regulations.

The Federal Circuit declined to consider this evidence of HUD's intent because, according to the court, "it would have been inconsistent" for HUD to make a promise to allow prepayment "in view of the express power to amend" the "regulations at any time that was reserved to HUD." App., *infra*, 24a. There would, however, have been nothing inconsistent in HUD binding itself contractually to specific parties to abide by the regulations then in effect while retaining the right generally to amend the regulations at any time. *Cf. Winstar*, 64 F.3d at 1542 ("While it is true as the government argues that a statement of policy . . . could be changed (which it later was), the

contract could not be changed except by mutual consent").

The panel majority's reasoning is utterly contrary to the long-established rule that a general reservation of a power to amend does not signify the right of the government to renegotiate the essential terms of a contract. *See, e.g., City of Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U.S. 368, 383-85 (1902) (holding that a city's reservation of right to prescribe regulations "from time to time" did not include the authority to reduce the rates that a streetcar company could charge, where the fixing of rates was "among the most material and important of the terms and conditions" of the contract); *see also id.* at 396-98. Indeed, the majority's view – that the Commitment's incorporation of the regulations then in effect included the regulation permitting their amendment – is "an absolutely classic description of an illusory promise." *Winstar*, 518 U.S. at 921 (Scalia, J., concurring in the judgment).

4. Unless reversed, the Federal Circuit's decision in this case will result in an unjustified windfall to the government, which received everything for which it bargained when it entered into the Section 221(d)(3) and Section 236 transactions, and a grave injustice to hundreds of private developers, who volunteered to join with the government to provide low-income housing for 20 years, and, by virtue of the enactment of ELIHPA and LIHPRHA, were forced to subsidize the low-income housing program beyond that agreed-upon term. The forced rental subsidies claimed by these private developers amount to hundreds of millions of dollars.

The Federal Circuit's opinion will also affect a great number of the savings and loans who relied on the same promise and suffered the same type of damages as the *Winstar* thrifts, but will be unable to recover because

"there is no single, integrating" agreement between the thrifts and the government. *California Fed. Bank*, 39 Fed. Cl. at 773-74 (rejecting, prior to the Federal Circuit's decision in this case, the government's argument that an express integration is required to recover for breach of contract). The government cannot deny the effect of the Federal Circuit's decision in this case on those savings and loans, having cited the decision immediately as precedent in several pending *Winstar* suits.[12]

Unless this decision is reversed, it will further encourage the government to renege on its promises to private parties once they have fulfilled their end of the bargain. When the government attempted to achieve the same result in *Winstar*, this Court rejected the government's attempt to hide behind technical arguments, and looked to the "realities of the transaction" to determine the parties' true intentions. *Winstar*, 518 U.S. at 863 (plurality opinion). It should do so here as well.

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12 See *Winstar Brief* at 6 (citing the Federal Circuit's opinion to support the argument that the presence of an integration clause is a "critical and recognized distinction" between the Winstar plaintiffs that may recover for breach of contract and those that may not).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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